

BONDS RECOVERY FROM THE ECONOMIC AGENTS BY THE UNIFICATION OF THE EUROPEAN LEGISLATION REGARDING THE PERFORMANCE OF THE COURT JUDGEMENTS DELIVERED IN THE EUROPEAN UNION STATES AND IN THE EUROPEAN ECONOMIC AREA

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Abstract

A large number of litigations between the economic agents, in our country and abroad, are to be solved at a rapid pace and also bonds recovery to debtors. In this way, the European Union Regulation allowed the release of binding securities which are valid in all European economic area, without the necessity for them to be acknowledged and approved by the state where forced performance is applied for.

Keywords – economic agents, judgment, European binding security, forced performance, creditor, debtor.

JEL Classification: K22, K40

As long as the multitude of domestic and foreign trade relationships engenders countless litigations which have to be solved reasonably to restore the rights infringed, the acceleration and simplification of the procedure of performing the judgements delivered in other member state than the one where the judgement was delivered, by eliminating all the intermediary measures which are taken before the performance in the state where this is applied for, as a necessity of the effective performance of the petitioners' claims which have proved to be true, irrespective of the country of origin, constitutes a necessity of our present time¹.

Setting up a free area of security and justice in the European Union required,

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¹ A large number of works in the field deal with the topic of performing the national and international judgements. We recommend several of them, among which: S. Zilberstein, V.M. Ciobanu, *Drept procesual civil. Executarea silită*, vol. I și II, Ed. Lumina Lex, Bucharest, 1996; Fl. Măgureanu, *Drept procesual civil*, XIth edition, Universul Juridic Publishing House, Bucharest, 2009, p. 558 and the next ones; D. Negulescu, *Execuțiunea silită, Principiile generale*, vol. I, Tipografia Guttenberg, Bucharest, 1910; E. Herovanu, *Teoria executării silite*, Cioflec Publishing House, Bucharest, 1942; I. Stoenescu, A. Hilsenrad, S. Zilberstein, *Tratat teoretic și practic de procedură a executării silite*, Academiei Publishing House, Bucharest, 1966; C. Sion, *Căile de execuție*, Iași, 1943; I. Stoenescu, S. Zilberstein, *Tratat de drept procesual civil*, vol. II, Universitatea Bucharest, 1981, p. 207 and the next ones; E. Dan, *Codul de procedură civilă adnotat*, Bucharest, 1921, p. 537 and the next ones; V. Negru, D. Radu, *Drept procesual civil*, E.D.P., Bucharest, 1972; G. Boroș, D. Rădescu, *Codul de procedură civilă comentat și adnotat*, All Publishing House, Bucharest, 1994, p. 637 and the next ones.

among other things besides Romania's accession to the European Union, the adoption of appropriate measures in the field of judiciary cooperation in civil and commercial matters, necessary measures for the good functioning of the domestic market, including the forced performance of the judgements and of the binding securities.

In the European Union creating a more refined and rapid procedure for recovering the bonds from debtors which, although going through all the stages of the court procedure, refused to willingly perform the final and irrevocable judgements.

As a consequence, in November 2000, the European Council adopted a program concerning the application measures of the principle of mutual acknowledgement of civil and commercial judgements², after which, beforehand, on 3rd December 1998, the Council adopted a plan of action for the Council and the Commission on the optimal rules of applying the provisions of the Treaty of Amsterdam regarding setting up a free area of security and justice (the Vienna Action Plan).

They adopted dispositions which might unify the rules regarding the conflicts of competence in civil and commercial matters and the simplification of the formalities with a view to rapid and simple acknowledging and performing judgements by the member states, when the judgements are delivered in a state and its performance is required in another state of the European Union or of the European economic area.

Law no. 191 of 19/06/2007³ for the approval of the Government Emergency Ordinance no. 119/2006 regarding the necessary measures for applying some communitarian regulations on the date of Romania's accession to the European Union, provided regulations regarding the application of the Regulation (CE) no. 805/2004 of the European Parliament and of the Council from 21st April 2004 regarding the creation of a European binding security for the certified⁴ bonds, regulation adopted in Strasbourg on 21st April 2004.

The provisions of this Regulation are obligatory for Romania as well, its dispositions provided are also obligatory as a whole their application is a prior to the

² See the European Parliament Notice of 8th April 2003 (JO C 64 E, 12.3.2004, p. 79), Common Position of the Council from 6.2.2004 (not published in the Official Journal) and European Parliament Position from 30.3.2004 (not published in the Official Journal).

³ Law no. 191/2007 from 19/06/2007 for the approval of the Government Emergency Ordinance no. 119/2006 regarding some measures necessary for the application of communitarian regulations on the date of Romania's accession to the European Union, was published in the Official Journal, Part I no. 425 from 26/06/2007. See also the Emergency Ordinance no. 119/2006 from 21/12/2006, published in the Official Journal, Part I no. 1036 from 28/12/2006.

⁴ See: Regulation (CE) no. 805/2004 of the European Parliament and Council from 21st April 2004 regarding the creation of a European binding security for certified bonds and the Council Regulation (CE) no. 44/2001 from 22nd December 2000 regarding the competence, the acknowledgement and the performance of judgements in civil and commercial matters. See also the changes made to the Regulation by the Regulation (CE) no. 1496/2002 of the Commission (JO L 225, 22.8.2002, p. 13).

national legislation. By „judgement”, as to its meaning in the Regulation, we understand any decision delivered by a court in a member state, irrespective of its denomination as „decision”, „sentence”, „ordinance” or „binding decision”⁵.

The Regulation no. 805/2004 of the European Parliament and the Council⁶ applies in civil and commercial matters, in, respectively:

- court decisions;
- judiciary transactions;
- authentic documents regarding certified bonds,
- judgements delivered as a result of the procedures against court decisions.

The Regulation does not apply in:

- fiscal, custom or administrative areas, neither regarding the state responsibility for acts or omissions committed while exercising public authority („*acta jure imperii*”);
- the state of the capacity of natural persons, matrimonial regimes, testaments or successions;
- the bankruptcy of arrangements or other similar procedures;
- social security;
- arbitration (art. 2 align. (2) of the Regulation no. 805/2004).

It is considered a certified bond:

- when the debtor acknowledged it expressly accepting it or appealing to a transaction which was approved by a court or concluded in front of a court during the court procedure;
- when the debtor was never against it, according the procedural rules of the member state of origin, during the court procedure;
- when the debtor was absent or was not represented in a court session regarding this bond after he opposed it initially during the court procedure, as long as his attitude is similar to a silent acknowledgement of the bond or of the facts stated by the creditor based on the legislation of the member state of origin;
- when the debtor certified it expressly by an authentic document.

The lack of objections from the debtor can be represented by the absence from the court session or the fact that he did not perform an invitation by the court to notify in writing his intention to defend himself in the respective case, although the summon procedure and the procedure of handing in the procedural documents was legally fulfilled.

Mutual trust in the administration of justice in member states makes it possible that the court in a member state considers that all terms for certifying a European binding security are met to allow the performance of the judgement in all other member states, without a judiciary control of the correct application of the minimal standards of procedure in the member state where the decision has to be performed.

⁵ In Sweden, in brief procedures regarding payment orders (betalningsföreläggande), the term „court instances” includes the Swedish public service for forced performance (kronofogdemyndighet).

⁶ For applying the regulation, see also the Decision 1999/468/CE of the Council from 28th June 1999 of establishing the procedures for exercising the competences of performance granted to the Commission (JO L 184, 17.7.1999, p. 23).

They considered that a judgement which was certified as a European binding security by the court of origin should be treated for its performance as if it were delivered by the member state where its performance was required⁷.

In the Regulation already mentioned they tried to ensure the free circulation of judgements, of the judiciary transactions and of the authentic documents in all member states, without the necessity to appeal to an intermediary procedure in the member state where they were performed.

As a result, a judgement which was certified as a European binding security in the member state of origin is acknowledged and performed in the other member states, without the necessity to admit the performance and without the possibility to oppose its acknowledgement, thus eliminating the procedure of the *exequatur*, a procedure which was sometimes really difficult.

For the free circulation of judgements, the judgements delivered in a member state regarding the Regulation already mentioned, judgements have to be acknowledged and executed in another member state, even if the debtor against whom the judgement was pronounced resides on the territory of a third state.

In these cases as well the rules of competence have to be provided by a high degree of predictability and be based on the principle according to which competence is, generally, based on the residence of the defendant and has to be always available according this law, except for some well defined situations where the object of the litigation or the autonomy of the parties justifies another factor of connection. For legal persons, the residence has to be independantly defined in order to enhance the transparency of the common rules and eliminating the conflicts of competence.

Except for the defendant's residence, there have to be alternate legal bases for competence according to a tight relationship between the court and the case or for the good administration of justice.

For unitary administration of justice it is necessary to decrease to a minimum the possibility of rivalling cases and eliminating the delivery of incompatible judgements in two member states. There has to be a clear and effective mechanism of resolving the litispence cases and the collateral cases, as well as of avoiding the issues which result from the national differences regarding the establishment of the date when an case is being judged.

Based on the principle of mutual trust, the procedure according to which a judgement delivered in a member state becomes exectory in another member state has to be rapid and efficient. For this purpose, the statement regarding the binding security of a judgement has to be automatically performed as a result of simply formal verification of the documents provided, without the possibility for the court

⁷ The United Kingdom was given as an example. There the registration of a foreign judgement certified will be done according to the same rules for the registration of a judgement delivered in another region of the United Kingdom and this does not imply a case verification of the foreign judgement.

to assign one of the rules of performance provided by the Regulation.

For certifying a court judgement as a European binding security, the Regulations already mentioned provided the necessity to establish the minimal standards met by the procedure which regulates the way the judgement is delivered in order for the debtor to be informed in due time and so that he could prepare his defense regarding the case against him, regarding the terms of his active participation in the procedure to oppose the respective bond, if he considers it necessary and regarding the consequences of his non participation.

The request for certification as a European binding security for certified bonds is optional for the creditor, who can choose the system of acknowledgement and performance provided by the Regulation (CE) no. 44/2001 or other communitarian instruments⁸.

According to the provisions of art. 5 of the Regulation, a court judgement which was certified as a European binding security in the member state of origin is acknowledged and performed in the other member states, without the necessity to admit its performance and the possibility to oppose its acknowledgement.

To be certified as a European binding security, on the request of the court of origin by the creditor at any time, the judgement regarding the bond certified delivered in a member state, has to fulfil the following conditions i:

- the judgement is executory in the member state of origin;
- the judgement is not compatible with the dispositions in the matter of competence provided by the Regulation (CE) no. 44/2001 chapter II sections 3 and 6;
- the court procedure in the member state of origin met the requirements provided by chapter III in the case of a certified bond according the article 3 alignment (1) letters (b) or (c) of the Regulation;
- the judgement was delivered in the member state where the debtor resides according to article 59 of the Regulation (CE) nr. 44/2001, in case you deal with a certified bond according to the article 3 alignment (1) letters (b) or (c) of the Regulation or in case this relates to a contract concluded by a person, the consumer, for a use which can be considered alien to his professional activity or in case the debtor is the consumer.

If the court judgement comprises an executory decision regarding the court costs, including the interests, this is also certified as a European binding security regarding the costs except the case when during the court procedure the debtor expressly opposed his obligation to support the respective costs, according the legislation of the member state of origin. If the judgement certified as a European binding security ceased to be executory or in the case they suspended or limited its

⁸ For the notification and communication of documents by the procedure provided by the Regulation, see also Regulation (CE) no. 1348/2000 of the Council from 29th mai 2000 regarding the notification and communication in the member states of the in- and extra-court documents in civil and commercial matters.

performance, they deliver a certificate which mentions the suspension or limitation of its executory force, based at any time on a petition to the court of origin.

The competence concerning the certification of binding securities belongs to the first instance in case the binding security is a judgement, including the one which states a judiciary transaction or an agreement of the parties under the legal terms or the court in whose circuit there is the deliverer of the document if the binding security is an authentic document.

The instance pronounces the judgement on the petition for delivering the certificate by concluding, without the parties being summoned.

The conclusion by which the petition was admitted is not liable to undergo any attack procedure, and the conclusion by which the petition was rejected may undergo recourse, within 5 days from its delivery for the current creditor, and from its communication for the creditor who was absent.

The certificate is delivered to the creditor and is communicated in a copy to the debtor.

The certificate of European binding security is delivered using the standard form provided in annex I of the Regulation no. 805/2004. The form is to be filled in the language the judgement is written in.

Based on a petition to the court of origin, the certificate for the European binding security may be corrected in case, as a result of a material error, there is an incompatibility between the judgement and the certificate.

Also it may be withdrawn in case it is obvious that the certificate was illegally delivered, taking into account the requirements provided by the regulation already mentioned.

The delivery of a European binding security may not undergo any attack procedure.

The certificate of the European binding security produces its effects within the binding force of the judgement whose execution is requested.

A judgement may not be certified as a European binding security if the debtor is entitled, on the basis of the legislation of the member state of origin, to require a review of the respective decision, when the following conditions are met:

- the document by which the instance is notified about or an equivalent document, accordingly, the summons was notified or communicated by one of the procedures provided by article 14 of the Regulation and which refers to the non-fulfilment of the terms required by the procedure used for solving and pronouncing the decision whose certification is petitioned for, concerning the debtor's summons;

- the notification or communication was not performed in due time to allow him to prepare his defense, with no fault from his side in this respect;

or

- the debtor was hindered from opposing the bond for reasons of force majeure or as a result of some extraordinary circumstances, without his fault in this respect, provided he performs fast in both cases.

The execution procedures are regulated by the legislation of member state of

execution, without infringing the dispositions of the Regulation already mentioned.

A judgement certified as a European binding security is performed under the same terms as a judgement delivered by the member state of execution.

The creditor is liable to provide for the authorities responsible for the execution in the member state of execution:

- a copy of the judgement, which meets the terms necessary to establish its validity;

- a copy of the certificate of European binding security, which meets terms necessary to establish its validity;

- accordingly, a transcription of the certificate of European binding security or a translation of this one in the official language of the member state of execution or, when the respective member state of execution has several official languages, in the official or in one of the official languages of the judiciary procedure of the area where its execution is required, according the legislation of this member state or in another language that the member state of execution declares it acceptable. Any member state may declare the official language/languages of the institutions of the European Community, other languages apart from its own language/languages which the respective member state consider acceptable for the certificate to be filled in. The translation is certified for conformity by an authorized person in this respect in one of the member states.

Neither a bail nor a warranty, irrespective of its denomination, may be enforced, because of the quality of ressortissant of a third member state or because of lack of residence in the member state of execution of the party who requires the execution in a member state of a judgement certified as European binding security in another member state.

At the debtor's request, the execution is rejected by the competent instance in the member state of execution when the judgement certified as European binding security is incompatible with a previously delivered judgement in any member state or in a third country, if:

- the previous judgement was pronounced between the same parties in a litigation with the same case;

- the previous judgement was pronounced in the member state of execution or it met the terms necessary for its acknowledgement in the member state of execution;

- the incompatibility of the decisions was not and could not have been invoked during the judiciary procedure in the member state of origin.

The judgement or its certification as European binding security may not ever constitute the object of a case review in the member state of execution.

When the debtor:

- filed for a suit against the judgement certified as a European binding security, including a petition for reviewing the meaning of the article 19;

- required the correction or withdrawal of a certificate of European binding security according article 10 of the Regulation, the court or the competent authority

of the member state of execution may, at the debtor's request:

- limit the execution procedure to ensurance measures or
- constrain the execution of setting up a warranty that he establishes or
- in special cases, to postpone the execution procedure.

The Regulation concerning European binding securities applies to judgements, judiciary transactions approved or concluded and to authentic documents enacted or registered after it enters into force.

Certainly there are also other measures imposed for a an accelerated solution of conflicts between the traders in the European Union, such as the precautionary arrangement, the ad-hoc⁹ mandate etc., which might hinder the insolvency of the companies in financial difficulties, if these can rise by reorganizing themselves.

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⁹ Law no. 381/2009 regarding the introduction of the precautionary arrangement and the ad-hoc mandate, was published in the Official Journal, Part I no. 870 from 14 December 2009 and entered into force on 13th January 2010.